7-27-2016

Quigley v. Kemp Respondent's Brief Dckt. 43725

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAYMIE QUIGLEY, an individual, and PAXTON QUIGLEY, an individual,

Respondents,

vs.

TRAVIS KEMP, an individual, SAINT ALPHONSUS REGIONAL MEDICAL CENTER, Inc. an Idaho corporation, and CHRISTOPHER TOBE, an individual.

Appellants.

Docket No. 43725
Ada County Case No. CV-2014-15104

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT.

HONORABLE RICHARD GREENWOOD, DISTRICT JUDGE PRESIDING.

Keely Duke Bryan Nickels DUKE SCANLAN HALL P.O. Box 7387 Boise, ID 83707-7387 Attorneys for Appellant	Vaughn Fisher Rebecca A. Rainey FISHER RAINEY HUDSON 950 W. Bannock Street, Ste. 630 Boise, ID 83702 Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. STATEMENT OF THE CASE

A. Nature of the Case

This case requires this Court to answer the question of whether Idaho Code § 6-1013 mandates the disclosure of the identity of a local consulting expert in order to satisfy the foundational requirements for an expert witness testifying on liability in a medical malpractice case. In a well-reasoned ruling from the bench, the district court, after preliminarily determining that Plaintiffs' testifying expert had met the foundational requirements of § 6-1013, ruled that the identity of the local consulting expert, retained by Plaintiffs pursuant to I.R.C.P. 26(b)(4)(B)[1] and upon whom Plaintiffs' testifying expert relied to learn the local standard of care, was protected from disclosure.

This Court should affirm the district court's decision which (i) confirms that the fundamental requirements of § 6-1013 for an expert witness testifying on liability in a medical malpractice case do not mandate the disclosure of the identity of a local consultant and (ii) uses a framework that clarifies when and under what circumstances the identity of a consulting expert, retained under Idaho Rule of Civil Procedure 26(b)(4)(B), must be disclosed.

The framework used by the district court avoids creation of a bright line rule mandating automatic disclosure of the identity of a local consulting expert—provided that the foundational requirements of § 6-1013 are otherwise met. The district court's process respects the competing interests of plaintiffs and defendants in preparing medical malpractice cases and leaves the ultimate decision appropriately placed in the sound discretion of the trial court. Accordingly, the

[1] As of the July 1, 2016, amendments, Id. R. Civ. P. 26(b)(4)(B) was modified slightly and is now found at Id. R. Civ. P. 26(b)(4)(D). This brief will continue to refer to the Id. R. Civ. P. 26(b)(4)(B) that appears in the 2015 Idaho Rules of Civil Procedure as that was the operative section at the time the events subject to this appeal occurred.

Quigleys respectfully request that this Court affirm the decision of the district court and remand this case for further proceedings consistent with such decision.

B. Course of Proceedings

For purposes pertinent to this appeal, Quigleys do not disagree with Appellant Dr. Kemp's description of the parties' interactions and the proceedings below regarding the issues subject to this appeal.

C. Concise Statement of Facts

Dr. Nakra is a board certified podiatric reconstructive foot and ankle surgeon. R. 000075-79. In her expert witness disclosures, Dr. Nakra set forth foundational facts for purposes of satisfying the requirements of Idaho Code § 6-1012 and § 6-1013. Specifically regarding Dr. Kemp, Dr. Nakra relied on her past background and experiencing which involved working with and alongside board certified orthopedic surgeons who were subject to the national standard of care and, through such work, became familiar with the national standard of care applicable to orthopedic surgeons with respect to the types of medical services that are the subject of her opinions. R. 000073. Her disclosures explained further that the standard of care regarding post-operative pain management was a national standard that was adhered to by physician's assistants, board certified podiatric surgeons, and board certified orthopedic reconstructive foot and ankle surgeons, to wit:

> Dr. Nakra developed actual knowledge of the standard of care pertaining to board certified orthopedic surgeons practicing in Boise, Idaho in August of 2012 in a post-operative setting by speaking with a physicians assistant who practiced in Boise, Idaho in August of 2012 and whose practice at that time included treating patients alongside and in conjunction with board certified orthopedic surgeons during the post-operative period and whose practice included making decision[s] alongside and in conjunction with board certified orthopedic surgeons regarding whether a patient's pain was adequately controlled for purposes of

> determin[ing] whether to discharge a patient and/or to conduct further inquiry to determine the causes and sources of a patient's recalcitrant pain. Through such work, the physicians assistant gained actual knowledge that the standard of care applicable for orthopedic surgeons practicing in Boise, Idaho in August of 2012 for determining whether a patient's pain was adequately controlled for purposes of determining whether to discharge a patient and/or to conduct further inquiry to determine the causes and sources of a patient's recalcitrant pain was the same as the national standard of care applicable to both orthopedic surgeons and physicians assistants at that time. Through detailed discussions with the physicians assistant, Dr. Nakra confirmed that the standard of care practiced by both physicians assistants and orthopedic surgeons in Boise, Idaho in August of 2012 are the same standards with which she is familiar based on her training, education, and experience as a board certified podiatric reconstructive foot and ankle surgeon. Dr. Nakra developed further knowledge of the standard of care applicable to board certified orthopedic surgeons practicing in Boise, Idaho in 2012 by reviewing the deposition testimony of Dr. Travis Kemp.

R. 000073-74. In her disclosures, Dr. Nakra detailed what that standard entailed:

> The local standard of care applicable to orthopedic surgeons practicing in Boise, Idaho in August of 2012 requires as one of the necessary considerations to the discharge of the patient is that the patient's pain be adequately controlled. Adequate pain control is achieved when the physician, in conjunction and consultation with the patient, believes the pain can be controlled and sustained at an acceptable level through oral medication and other pain-relieving mechanisms such as rest, ice, and elevation following the patient's discharge.

Tr. 19:24 – 20:11. Dr. Kemp has not disputed Dr. Nakra's factual assertion that the local standard of care for board certified orthopedic surgeons practicing in Boise, Idaho in August of 2012 in a post-operative setting involving recalcitrant pain was the same as the national standard of care. *See* Tr. 12-13; 19-21.[2]

[2] It is critical to note that the standard of care is a fact, not an opinion. To be clear, the differences between the conclusions reached by Dr. Nakra and Dr. Kristensen and Dr. Kemp that were discussed during the hearing indicate different opinions drawn from the underlying facts.

Dr. Kemp requested that Plaintiffs disclose the identity of the local physician's assistant who, through consultation with Dr. Nakra, confirmed for her that the local standard of care applicable to board certified orthopedic surgeons practicing in Boise, Idaho in August of 2012 in a post-operative setting involving recalcitrant pain was the same as the national standard of care. R. 000073-74. Plaintiffs objected to Dr. Kemp's request on the grounds that Dr. Nakra had disclosed the relevant fact (i.e., that the local and national standard were the same) and that additional facts and opinions held by the consulting expert retained by plaintiffs were protected under I.R.C.P. 26(b)(4)(B). The district court agreed with Plaintiffs' position that the **fact** at issue was whether the local and national standard of care were the same, that Dr. Kemp had resources pursuant to which he could confirm that **fact** for himself, and that I.R.C.P. 26(b)(4)(B) shielded the identity of the local expert with whom Dr. Nakra consulted. Tr. 26-28. This appeal followed.

II. ISSUES PRESENTED ON APPEAL

A. Whether a mandatory bright line rule requiring the automatic disclosure of the identity of a local consultant impermissibly heightens the requirements of Idaho Code § 6-1012 and § 6-1013.

B. Whether the district court abused its discretion in holding that the identity of a local consultant who was retained pursuant to I.R.C.P 26(b)(4)(B) was protected from disclosure under the particular facts of this case.

III. ATTORNEY'S FEES ON APPEAL

There is not a basis upon which Quigley can seek attorney's fees on appeal.

IV. SUMMARY OF ARGUMENT

Idaho Code § 6-1013 requires that, in order to provide opinion testimony on liability in a medical malpractice case, a testifying expert must have "actual knowledge" of the local standard of care for the relevant time, place, and specialty. Idaho Code § 6-1013 does not mandate any

particular mechanism pursuant to which a testifying expert is required to obtain that "actual knowledge." The code section itself requires only that the testifying expert establish that she has "actual knowledge."

The local standard of care is a fact—indeed, one of many facts—that underlies the opinion of an expert witness. Consistent with the requirements of I.R.C.P. 26(b)(4), Dr. Nakra disclosed that fact upon which she was relying to Defendant: the local standard of care for board certified orthopedic surgeons in Boise, Idaho in August of 2012 working in the post-operative setting and dealing with recalcitrant pain was the same as the national standard with which she was familiar through her own education, experience, and practice. She further detailed what that standard entailed.

By the present appeal, Dr. Kemp does not seek to discover information pertaining to that fact. Rather, Dr. Kemp seeks, for purposes of undermining the foundation of Dr. Nakra's opinion, discovery regarding facts known to and opinions held by the person through whom Dr. Nakra confirmed that fact. I.R.C.P. 26(b)(4)(B) protects litigants from being subjected to discovery of facts known to and opinions held by experts who are not expected to testify at trial. By its express terms, I.R.C.P. 26(b)(4)(B) precludes this discovery "except upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Because it is not impracticable for Dr. Kemp to obtain facts regarding the local standard of care by other means, the district court did not abuse its discretion in denying Dr. Kemp's motion to compel and granting the Quigleys' motion for protective order.

V. STANDARD OF REVIEW

Plaintiffs do not dispute that Dr. Kemp has accurately articulated the standard of review applicable to this appeal.

VI. ARGUMENT

This Court has debated but not yet settled the question of whether, as a precondition of meeting the foundational requirements of Idaho Code § 6-1012 and § 6-1013, Plaintiffs are required to automatically disclose the identity of a local consulting expert from whom their testifying expert learned the standard of care. Because a testifying expert is able to obtain actual knowledge of the local standard of care in a myriad of ways, the decision to rely on a local consultant should not subject Plaintiffs to an additional burden of having that local consultant serve as a secondary expert witness. Moreover, where a district court makes a preliminary determination that a testifying expert has demonstrated actual knowledge of the local standard of care sufficient to satisfy the district court in its role as gatekeeper under Idaho Rule of Evidence 104(a), that court acts within the bounds of its discretion to preclude additional discovery into matters protected by I.R.C.P. 26(b)(4)(B). Accordingly, this Court should reject Dr. Kemp's request to create a mandatory bright line rule requiring Plaintiffs to automatically disclose the identity of consulting experts from whom their testifying experts learn the local standard of care because such a rule impermissibly heightens the requirements of § 6-1012 and § 6-1013 and is inconsistent with the protections afforded by I.R.C.P. 26(b)(4)(B).

A. Idaho Code § 6-1012 and § 6-1013 do not mandate the disclosure of the identity of a local consulting expert and creating that mandatory, bright-line rule impermissibly heightens such statutory requirements.

This Court has never found that a testifying expert failed to adequately familiarize herself with the local standard of care based exclusively on the fact that the local consultant remained

anonymous. Rather, this Court has seriously questioned whether such determination would impermissibly heighten the requirements of Idaho Code § 6-1012 and § 6-1013: "Indeed, a majority of this Court recently expressed 'grave misgivings' about a plurality opinion's suggestion 'that the identity of the local health care provider with whom a Plaintiff's expert consults must be disclosed as part of the foundation for that opinion,' expressing our concern that such a rule 'elevated the requirements for an expert's affidavit beyond the requirements of I.C. § 6-1013'." *Bybee v. Gorman*, 157 Idaho 169, 178, 335 P.3d 14, 23 (2014) (quoting *Arregui v. Gallegos-Main*, 153 Idaho 801, 811, 291 P.3d 1000, 1010 (2012)) (Horton, J., specially concurring).

Justice J. Jones, specially concurring in *Bybee*, voiced concerns that the mandatory bright line rule advocated by Dr. Kemp in this case would increase the requirements of Idaho Code § 6-1013: "I would certainly never subscribe to the proposition 'that the identity of the local health care provider with whom a Plaintiff's expert consults must be disclosed as part of the foundation for that opinion'." *Bybee v. Gorman*, 157 Idaho 169, 180, 335 P.3d 14, 25 (2014) (J. Jones, J. specially concurring). The concerns expressed in these opinions are well-founded as there is nothing in the foundational requirements of § 6-1012 or § 6-1013 that mandate the automatic disclosure of the identity of a local testifying expert.

Idaho Code § 6-1012 requires a plaintiff to prove:

> ... by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon... as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he or she was functioning.

Notably, Idaho Code § 6-1012 does not contain a requirement that plaintiffs disclose the identity of local consulting, non-testifying experts. Section 6-1013 provides that the testifying expert required by § 6-1012 be allowed to testify only upon demonstrating the proper foundation, which includes the following:

> 1. That such an opinion is actually held by the expert witness,
>
> 2. that the said opinion can be testified to with a reasonable degree of medical certainty, and
>
> 3. that such expert witness possess professional knowledge and expertise **coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed....**

(emphasis added). Like § 6-1012, § 6-1013 also does not contain a specific requirement that the identity of a local consultant be disclosed.

A survey of cases demonstrates that Idaho's statutory framework does not prescribe any particular methodology for an expert witness obtaining the local standard of care:

> A common means for an out-of-area expert to obtain knowledge of the local standard of care is by inquiring of a local specialist. (citations omitted). That is not, however, the only means for obtaining knowledge of the local standard of care.

Perry v. Magic Valley Reg. Med. Ctr., 134 Idaho 46, 51-52, 995 P.2d 816, 821-22 (2000). For example, experts may gain actual knowledge of the local standard of care by reviewing deposition transcripts that, in some way, articulate the local standard of care. *Id.* (use of deposition transcripts and texts upon which deponents relied). *Accord Kozlowski v. Rush*, 121 Idaho 825, 828-29, 828 P.2d 854, 857-58 (1992).

The critical factor in each case is whether the testifying expert can articulate both how she became familiar with the local standard of care and, even more importantly, what the standard of care is. For example, in *Kozlowski v. Rush*, the expert was able to articulate that, through the

review of deposition transcripts and texts, he confirmed that the local standard of care was the same as the national standard. 121 Idaho at 282-29, 282 P.2d at 85-58.

In those cases, where a trial courts have concluded that an expert failed to adequately familiarize herself with the standard of care, it is always the testifying expert's inability to articulate the standard of care and provide competent information explaining how the testifying expert came to learn such standard that drives the decision. In *Suhadolnick v. Pressman*, the testifying expert relied on deposition testimony to learn the local standard of care. 151 Idaho 110, 119, 254 P.3d 11, 20 (2011). However, unlike *Kozlowski* and *Perry*, the deposition testimony did not establish the standard of care. Accordingly, these cases demonstrate that it is not the methodology used (each case relied on review of deposition transcripts), but the qualitative information derived from the methodology used.

Similarly, in those cases where anonymity was at issue, decisions holding that the testifying expert did not meet the foundational requirements were not premised on the fact of anonymity, but rather the lack of qualitative information affirmatively demonstrating that the testifying expert had done its due diligence in learning the local standard of care. In *Dulaney v. St. Alphonsus Regional Medical Center*, the testifying expert relied on an anonymous professor to familiarize himself with the local standard of care. 137 Idaho 160, 169, 45 P.3d 816, 825 (2002). However, the testifying expert failed to articulate how the anonymous professor had knowledge of the local standard of care. *Id.* This Court did not pass on whether an anonymous consultant was an acceptable method of learning the standard of care, relying instead on the inadequacy of the affidavit that failed to show how the anonymous consulted was familiar with the standard of care:

> Even assuming that the use of an anonymous informant is an acceptable manner for adequately familiarizing an out-of-area

> physician of the local standard of care, Dr. Stump's affidavit does not allege specific facts showing that the anonymous professor was familiar with the standard of care for orthopedic surgeons in Boise in August 1994.

Id.

Similar deficiencies were noted in the insufficient affidavit filed by the testifying expert in *Arregui v. Gallegos-Main,* 153 Idaho 801, 809, 291 P.3d 1000, 1008 (2012). Specifically, in addition to having not identified the local consultant, the testifying expert's affidavit also "did not describe the type of chiropractic practice he ran, nor how he became aware of the local standard of care, how long he practiced in the Nampa-Caldwell, area, or whether he was familiar with torticollis and the specific procedures allegedly used on the Patient." *Id.*[3] This Court then focused on the fact that it is the qualitative nature of the information learned from the local consultant that determines whether the testifying expert has demonstrated adequate familiarity with the local standard of care: "in a medical malpractice case, it must be shown that the expert possesses sufficient knowledge of the specific procedures used by the defendant physician as the alleged malpractice." *Id.* (citing *Suhadolnick v. Pressman*, 151 Idaho 110, 115-16, 254 P.3d 11, 16-17 (2011). Again, it is the qualitative information contained in the expert's explanation of how she met the foundational requirements that matters; it is not the methodology used.

In this case, the district court preliminarily found that the affidavit of Dr. Nakra contained sufficient qualitative information upon which the court could determine that Dr. Nakra possessed actual knowledge of the standard of care: she articulated both the standard of care and how the local consultant had familiarity with the standard of care. Tr. 27:8-11. On appeal, Dr. Kemp did not challenge the sufficiency of the foundation for Dr. Nakra's opinions. Rather, Dr. Kemp

[3] "In *Arregui*, the identity of the local expert was merely part of a laundry list of problems identified with regard to the local expert's experience and qualifications." *Bybee v. Gorman*, 157 Idaho 169, 180, 335 P.3d 14, 25 (2014) (J. Jones, J., specially concurring).

argues only that he should be able to engage in additional discovery so that he can find a "silver bullet" (App. Br. At 22) pursuant to which he can undercut the foundation of Dr. Nakra's opinion. Because that information can and should be protected by I.R.C.P. 26(b)(4)(B), this Court should hold that discovery into such facts, based on the record that it before it, is inappropriate.

B. I.R.C.P. 26(b)(4)(B) provides an appropriate mechanism for protecting the identity of a local, non-testifying expert who serves as a consulting witness.

Not only does Dr. Kemp's request that this Court create a mandatory bright line rule whereby all plaintiffs are required automatically to disclose the identity of their local consultants heighten the statutory requirements of § 6-1013, it is also inconsistent with I.R.C.P. 26(b)(4)(B). I.R.C.P. 26(b)(4)(B) reads as follows:

> A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except as provided in Rule 35(b) or **except upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.**

(emphasis added).

In preparing this case, Quigleys retained[4] non-testifying experts to consult with and educate Dr. Nakra regarding a single fact upon which she relied: i.e., what was the local standard of care applicable to the relevant specialty, in the relevant locality, for the relevant

[4] Dr. Kemp makes mention throughout his brief that Plaintiffs did not create an adequate record below that they had "retained" their consulting experts in a manner sufficient to invoke the protections of Idaho Code Section 26(b)(4)(B). Dr. Kemp did not raise this issue in his moving papers to the district court below and it does not appear as though the district court gave the matter any consideration in its decision. Accordingly, to the extent that this issue has any bearing on this Court's analysis, it is not properly before this Court.

timeframe. With respect to each care provider, the fact upon which Dr. Nakra relied—i.e., what was the applicable standard of care—was disclosed in Dr. Nakra's expert witness disclosures.

Pursuant to I.R.C.P. 26(b)(4)(B), defendants are entitled to discover the identity of a non-testifying expert "only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain [such fact] on the same subject by other means." Rather than attempting to meet the burden of I.R.C.P. 26(b)(4)(B), Dr. Kemp argues that if he is not allowed to discover the identity of Plaintiffs' non-testifying experts he will be unfairly prejudiced because "[h]e is then unjustifiably barred from challenging whether D.P.M. Nakra has in fact met the statutory foundational requirements to offer standard of care opinions at trial." App. Br. 15.

In his argument, Dr. Kemp overstates the foundational requirements of Idaho Code Ann. § 6-1013: the statute requires only that the testifying expert "have actual knowledge of the local standard of care." The district court determined that, based on the record before it, Dr. Nakra demonstrated that she met that foundational requirement: she provided a specific, detailed explanation of the local standard of care (Tr. 27:8-11) thereby demonstrating her actual knowledge. To the extent Dr. Nakra had been less specific and detailed, Defendants were at liberty to challenge the precision of her articulation of the standard of care; they had an opportunity to demonstrate how Dr. Nakra's "actual knowledge" of the standard of care, as detailed in her submissions, was somehow flawed.

Despite Quigleys' invitation to Dr. Kemp to demonstrate to the court how Dr. Nakra's articulation of the local standard of care was inadequate or flawed, Dr. Kemp failed to do so. Rather than challenge Dr. Nakra's articulation of the standard of care, Dr. Kemp insists, instead, on challenging only how she acquired that information. Notably, Dr. Kemp has not attempted to

show that he is unable to obtain information regarding the local standard of care from another source (including himself).

Dr. Kemp's failure to demonstrate the "exceptional circumstances under which it was impracticable" for him to learn the applicable standard of care—that singular fact from Plaintiffs' non-testifying experts upon which Dr. Nakra relied—establishes that the district court did not abuse its discretion when it ordered that Quigleys did not have to disclose the identity of their local consulting experts.

C. Motions to compel or for protective orders are appropriate mechanisms pursuant to which parties can and should obtain preliminary determinations regarding whether a testifying expert has met the foundational requirements of § 6-1013.

In responding to competing motions to compel and for a protective order, the district court properly determined that it would ultimately be required to decide, in its role as gatekeeper, whether Dr. Nakra had met the foundational requirements of § 6-1013. Tr. 9-10; 26-27. In that role, the district court indicated that the record before it was sufficient to establish that Dr. Nakra had actual knowledge of the applicable standard of care to which her expert opinion testimony is addressed. Tr. 26-27. Specifically, the district court noted the lack of any suggestion that Dr. Nakra was misleading the court, coupled with the level of detail and specificity contained in Dr. Nakra's affidavit regarding the standard of care:

> ... I don't think that I have any intimation that Dr. Nakra is telling a falsehood under oath when she said she had the conversation with the people she said she had. Unlike the challenged affidavits in some of the cases that I read, this one is quite specific as to what is the standard of care, what was discussed.

Tr. 27: 4-11. Because the district court, fulfilling its role as gatekeeper under Idaho Rule of Evidence 104(a), determines at trial whether an expert witness has met the foundational

requirements of § 6-1013, the district court correctly evaluated the foundational evidence in this case.

D. The framework utilized by the district court is consistent with this Court's decision in *Bybee* and can be reconciled with competing concerns outlined in footnote 8 of that decision.

As noted above, for this Court to institute a mandatory bright line rule pursuant to which the identity of a local consulting expert is automatically subject to disclosure would impermissibly heighten the statutory requirements of Idaho Code § 6-1012 and § 6-1013. However, the framework employed in this case—wherein the district court, in response to competing motions to compel or for protective orders, makes a preliminary determination regarding whether a testifying expert has met the foundational requirements of 6-1013 and, based thereon, determines whether the identity of the local consultant is subject to disclosure—is a procedure by which courts and practitioners alike can have a predictable, workable solution that is consistent with this Court's jurisprudence.

Moreover, the framework used by the district court herein is a means pursuant to which this Court can reconcile the competing interests identified in the holding of *Bybee v. Gorman*, 157 Idaho 169, 335 P.3d 14 (2014) and important dicta contained in footnote 8 of that same decision. Specifically, *Bybee* addressed the issue of whether the identity of a non-testifying expert was a foundational requirement for the admissibility of the testifying expert's affidavit at summary judgment. This Court held that an affidavit demonstrating how a testifying expert obtained "actual knowledge" of the standard of care did not need to disclose the identity of the non-testifying expert to survive summary judgment, because at summary judgment, the Court is required to view the affidavit as true. *Id.* at 178. However, in Footnote 8 the Court added:

> The corollary of this holding is that defendants should be permitted to conduct discovery as to the identity of consulting physicians.

> As in *Dunlap*, an expert's claim to have consulted with a local practitioner in order to gain familiarity with the applicable standard of health care practice may present questions of credibility for consideration by the ultimate trier of fact.

Critically, *Bybee* failed to reconcile the comment made in footnote 8 with the observation made just before it reached its holding:

> Indeed, a majority of this Court recently expressed "grave misgivings" about a plurality opinion's suggestion "that the identity of the local health care provider with whom a Plaintiff's expert consults must be disclosed as part of the foundation for that opinion," expressing our concern that such a rule "elevated the requirements for an expert's affidavit beyond the requirements of I.C. 6-1013."

Id. at 178 (citing *Arregui v. Gallegos-Main,* 153 Idaho 801, 811, 291 P.3d 1000, 1010 (2012) (Horton, J. specially concurring)).[5]

While both *Bybee* and *Arregui* involved the admissibility of an expert's affidavit on summary judgment, the requirements of § 6-1013 are not restricted to affidavits on summary judgment. Rather, the requirements of § 6-1013 speak to the foundation for admissibility of expert witness testimony at all stages. Accordingly, if disclosing the identity of consulting experts constitutes a "heightened" requirement at summary judgment (as suggested in *Bybee* and *Arregui*), it just as equally constitutes a "heightened" requirement for admissibility at trial if the foundational requirements of § 6-1013 have otherwise been met. Accordingly, a framework

---

[5] "One example is the suggestion that the identity of the local health care provider with whom a Plaintiff's expert consults must be disclosed as part of the foundation for that opinion. As a former trial court judge, I was called upon to resolve several discovery disputes in which defense counsel sought to learn the identity of the individuals consulted by Plaintiffs' experts in the course of familiarizing themselves with the applicable standard of health care practice. In the course of those proceedings, it was clear that there is a fundamental disagreement among district judges as to whether this information must be disclosed. Although not necessary to resolution of this appeal, the majority appears to decide this question in a fashion which will be welcomed by the insurance defense bar and medical community." *Arregui v. Gallegos-Main*, 153 Idaho 801, 811, 291 P.3d 1000, 1010 n.2 (2012) (Horton, J. specially concurring).

premised upon something other than a somewhat arbitrary "before vs. after summary judgment" model can and should be used to determine whether the identity of a local consultant is discoverable. The district court used an appropriate framework.

The framework used by the district court addressed and reconciled many factors not presented to the *Bybee* Court and, consequently, not reached in the *Bybee* decision. For example, unlike *Bybee*, the decision from which this appeal is taken did not involve a motion for summary judgment. Indeed, because the district court was dealing with competing motions to compel and for protective orders, the district court was not constrained by the requirement that it assume the truthfulness of the affidavit of Dr. Nakra. Accordingly, under this procedural posture a defendant in Dr. Kemp's position is at liberty to introduce evidence to be considered by the district court for purposes of challenging the foundation of a testifying expert's opinion.

In the proceedings below, Quigleys repeatedly invited Dr. Kemp to articulate exactly how or why he believed Dr. Nakra's statements regarding the local standard of care were incorrect.[6] Quigleys maintain that Dr. Kemp failed to accept this invitation, giving only vague, conclusory responses to how he disagreed with the standards of care articulated by Dr. Nakra. Tr. 12:14-20; Tr. 20:12 – 21:13. While the district court did not specifically state the extent to which it relied on Quigleys' argument that Dr. Kemp did not contest the accuracy of Dr. Nakra's recitation of

[6] In her disclosures, Dr. Nakra articulated the standard of care regarding recalcitrant pain as follows: "The local standard of care applicable to orthopedic surgeons practicing in Boise, Idaho in August of 2012 requires as one of the necessary considerations to the discharge of the patient is that the patient's pain be adequately controlled. Adequate pain control is achieved when the physician, in conjunction and consultation with the patient, believes the pain can be controlled and sustained at an acceptable level through oral medication and other pain-relieving mechanisms such as rest, ice, and elevation following the patient's discharge." Tr. 19:24 – 20:11.

the standard of care,[7] the district court clearly did rely on the level of specificity contained in Dr. Nakra's affidavit and disclosures as the basis for its decision. Tr. 27:3-11.

The procedural posture of a motion to compel or a motion for protective order enables a district court to consider the relative weight of competing evidence presented (unlike the constraints of a motion for summary judgment that existed in *Bybee*). Accordingly, the framework employed by the parties in this case presented an opportunity for the district court to make a meaningful (albeit preliminary) determination regarding whether the foundational requirements of § 6-1013 were met. Because the district court determined, at least preliminarily, that the foundational requirements of § 6-1013 had been met, the district court is then in prime position to determine whether it, as gatekeeper, also needs the parties to present the additional evidence that was the subject of Dr. Kemp's motion to compel. The district court determined such evidence, which was otherwise protected by I.R.C.P. 26(b)(4)(B), was unnecessary and it did not abuse its discretion in making that determination.

Another important factor that distinguishes this case from the dicta contained in footnote 8 of *Bybee* is that in this case, unlike in *Bybee*, Plaintiffs protected their consulting expert from disclosure pursuant to I.R.C.P. 26(b)(4)(B). At the district court, Dr. Kemp and the Quigleys took extremely different positions regarding the scope of the protections afforded under I.R.C.P. 26(b)(4)(B). Specifically, the parties hotly disputed the scope of the words "on the same subject" as used in the proviso: "...except upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions **on the same subject** by other means." (emphasis added).

---

[7] Despite Dr. Kemp's inability to articulate how his "version" of the standard of care differed from that stated by Dr. Nakra, the district court indicated that it "would take them at their word" that defendants disagreed with Dr. Nakra's articulation of the standard of care. Tr. 19:6-14.

The Quigleys argued, and the district court agreed, that the words "on the same subject" meant the local standard of care. Conversely, Dr. Kemp argued that the words "on the same subject" meant whether the local expert had competently met the foundational requirements of § 6-1013. In reality, depending on the particular circumstances of the case, both interpretations can be true.

In this case, based largely upon the fact that Dr. Nakra had provided a specific, detailed explanation of the local standard of care, the district court correctly viewed "on the same subject" to mean the local standard of care. Based thereon, the district court determined that Dr. Kemp had adequate means at his disposal to obtain facts or opinions regarding the local standard of care from other sources.

Conversely, however, if Dr. Nakra had not provided a specific, detailed explanation of the local standard of care and, instead, provide vague and conclusory allegations that she "knew what it was" then it would have been appropriate to read "on the same subject" as regarding whether Dr. Nakra had actual knowledge of the local standard of care. In that case, the sources of her alleged (but unsupported) knowledge would be much more at issue. Indeed, in a case where plaintiffs' expert does not provide specific, detailed explanation of their actual knowledge of the standard of care, it would be appropriate to allow inquiry into the basis for why said expert claims to have knowledge of said undisclosed fact.[8]

Because in this case, Dr. Nakra disclosed specific, detailed facts to the district court demonstrating her actual knowledge of the local standard of care, and because Defendants can

[8] Dr. Kemp's argument that "identity" is discovery about under I.R.C.P. 26(b)(4)(B) is disingenuous. App. Br. 24. Dr. Kemp makes clear throughout his entire argument that it is not the bare "identity" of the local consultant that is the subject of his discovery requests, but that he wishes to depose the local consultant on a number of topics designed to challenge the foundation of Dr. Nakra's opinion. App. Br. 15-17. Accordingly, this form over substance argument is little more than an end-run around the merits of the issue to be addressed by this Court.

get information regarding the local standard of care from other sources, the district court did not abuse its discretion in holding that the identity of Dr. Nakra's local consultant is protected by I.R.C.P. 26(b)(4)(B).

E. The district court did not rely on extra-statutory considerations in making its decision.

In section C of his opening memorandum, Dr. Kemp takes issue with Plaintiffs raising "extra-statutory" considerations in support of their argument to the district court below. However, the district court made it abundantly clear that such "extra-statutory" considerations did not factor into its decisions. Tr. 25-26. Specifically, the district court explained:

> There is certainly no record that that's what's going on here. But I also think it is sort of beyond – it is not really questioned that within the medical community those who testify against other members of the medical community, except frequently in the most egregious cases, subject themselves to a certain amount of ostracism or disfavor.
>
> But that's not what our statutes talk about. That remedy may lie with the legislature, or it may lie with the Idaho Supreme Court; I don't know.

Tr. 26: 7-19. Given that the district court made clear that it was not relying on "extra-statutory" considerations to support its decision, it is unnecessary for this Court to consider whether such non-reliance was an abuse of discretion.

VII. CONCLUSION

For the forgoing reasons, Quigleys respectfully request that this Court hold that the identity of a local consulting expert is not a mandatory disclosure requirement under Idaho Code § 6-1012 and § 6-1013. From there, Quigleys request that this Court find that the district court did not abuse its discretion in entering orders protecting from discovery the identity of the local

consultants used by Quigleys to consult with their testifying expert regarding the local standard of care.

RESPECTFULLY SUBMITTED this 27th day of July, 2016.

FISHER RAINEY HUDSON

By _____
Rebecca Rainey – Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2016, I caused to be served a copy of the foregoing **RESPONDENT'S BRIEF** on the following, in the manner indicated below:

Andrew C. Brassey
Brassey Crawford, PLLC
P.O. Box 1009
Boise, ID 83701-1009

(X) Via U.S. Mail
( ) Via Facsimile – (208) 344-7077
( ) Via Overnight Mail
( ) Via Hand Delivery

Attorney for Defendant Saint Alphonsus Regional Medical Center

Keely Duke
Duke Scanlan Hall
P.O. Box 7387
Boise, ID 83707-7387

(X) Via U.S. Mail
( ) Via Facsimile – (208) 342-3299
( ) Via Overnight Mail
( ) Via Hand Delivery

Attorney for Defendant Dr. Travis Kemp

Raymond D. Powers
Powers Tolman Farley
P.O. Box 9756
Boise, ID 83707-9736

(X) Via U.S. Mail
( ) Via Facsimile – (208) 577-5101
( ) Via Overnight Mail
( ) Via Hand Delivery

Attorney for Dr. Christopher Tobe

_____
Rebecca Rainey